No. 14609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. D. HAHN, as Administrator of the Estate of YOUNG D. HAHN, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the Estate of HERBERT HUXLEY HAHN,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

The Pleadings.

Prudential Insurance Company of America, by appropriate pleadings, obtained a judgment in Interpleader in the United States District Court, Southern District of California, Central Division, on November 27, 1953, by which Appellant, as administrator of the Estate of Young D. Hahn, deceased, and Appellee as administratrix of the Estate of Herbert Huxley Hahn, deceased, were ordered to assert their respective claims to the proceeds of four insurance policies insuring the life of Herbert

Huxley Hahn in which Young D. Hahn was named beneficiary. Herbert Huxley Hahn was the son of Young D. Hahn.

Each filed a cross-complaint and an answer to the cross-complaint of the other [Appellant's Cross-Comp., R. pp. 3-9; Ans., R. pp. 17-19; Appellee's Cross-Comp., R. pp. 11-17; Ans., R. pp. 9-11]. Crucial to each cross-complaint was the claim, respectively of each interpleader, that his intestate was the survivor of a common disaster in which both decedents died.[1] [Appellant's Claim, R. p. 8; Appellee's Claim, R. p. 16].

The cause was heard at three sessions of the District Court by the Honorable Ben Harrison, on February 8, 1954; March 15, 1954, and August 16, 1954 and the Court filed its Findings of Fact and Conclusions of Law [R. p. 29-32) and Judgment [R. pp. 33-35], filed and entered on August 30, 1954, holding as to the critical issue of survivorship that Herbert Huxley Hahn was the survivor in the common disaster.

Notice of Appeal was timely filed on September 29, 1954 [R. pp. 35-36] and duly certified by the Clerk of the District Court [R. p. 37] and the designation of points upon which Appellant will rely was duly filed on January 17, 1955 [R. p. 182].

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[1]The Probate Court of California provides: Section 296.3 INSURED AND BENEFICIARY: Where the insured and beneficiary in a policy of life insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

The Facts.

The underlying facts that gave rise to the litigation are not in dispute. Young D. Hahn and his 12 year old son, Herbert Huxley Hahn, were riding in a Nash automobile driven by one Ella Moya Dioz on Highway No. 2 in the Republic of Mexico [R. p. 85] on the night of Saturday, April 18, 1953. Some time between 11:30 P. M. and midnight the car struck a cement mixer, parked on the highway, between Tia Juana and Mexicali. The driver was apparently thrown clear of the car and on to the pavement. Young D. Hahn was riding in the front seat of the car; Herbert Huxley Hahn, the son, was riding in the rear seat. Each remained in the car after the accident. Apparently, there were no eye witnesses to the accident.

The testimony as to the time of death, the critical issue here, was conflicting. Appellant called two witnesses, who were at the scene of the accident, Marcario Luna-Ramirez and Jose Bello [R. pp. 47-61 and 61-67, respectively], both of whom were police officers and both of whom appeared and testified on February 8, 1954. Appellee produced one witness in court, Galdino Losa Cruevas [R. pp. 76-97] who was at the accident itself and he testified on March 15, 1954. Appellee introduced the testimony of two other witness through depositions, who claim to have been at the scene of the accident: Celestino Lupercio Perez [R. pp. 139-161], and Ernestina Thomas whose deposition is Exhibit G in evidence [R. p. 161]. Her deposition does not appear in the printed record but was read and considered by the Court [R. p. 160]. The Perez deposition was read into the record on March 15, 1954, the same date on which Cruevas testified. The Thomas deposition was filed on May 22, 1954 [R. p. 160], and

was considered by the Court on August 16, 1954. Appellee also introduced the deposition of the autopsy surgeon, Dr. Gustavo Arevalo [R. pp. 99-137] and that deposition was considered by the Court on March 15, 1954. Appellant called one impeaching witness on August 15, 1954, Bert Ritchey [R. pp. 161-168].

The trial chronology, important in a consideration of the testimony adduced, follows:

1. *February 8, 1954.* Cause called for trial with both sides announcing ready [R. p. 38]. Appellant's witnesses, Ramirez and Luna, appeared and testified. Cause continued over Appellant's objection [R. p. 67] to March 1, 1954.

2. *March 15, 1954.* Cause again called for trial [R. p. 67], after continuance from March 1, 1954 on motion of Appellee. Appellee's witness, Cruevas, appeared and testified. Depositions of Appellee's witnesses, Arevalo and Perez, read into record. Court announces Finding of Fact of simultaneous death [R. p. 99].

3. *April 5, 1954.* Motion of Appellee to re-open cause granted.

4. *August 16, 1954.* Cause again called for trial. Deposition of Appellee's witness, Ernestina Thomas, received [R. p. 160]. Appellant's witness, Ritchey, testifies [R. pp. 161-168]. Court announces finding that Herbert Huxley Hahn survived [R. p. 171].

Ramirez and Bello were public officials, employes of the Federal Department of Highways of the Republic of Mexico [R. p. 47]. Ramirez testified on February 8, 1954, that he and Bello arrived at the scene of the acci-

dent shortly after receiving an accident call at 11:30 or 11:35 P. M., on April 18, 1953 [R. p. 48]. He testified that on arrival he found a woman lying on the ground and "inside of the car on the front, on the right side, there was a man pressed against the front seat and the instrument panel of the car. He was breathing with difficulty" [R. p. 49]. The following questions were then asked:

> "Q. Was anyone in the rear seat? A. Yes, on the rear seat there was a boy, a minor. . . .
>
> Q. Did you make any effort to determine whether or not the boy was alive? A. Yes, I did.
>
> Q. And what effort did you make? A. That the child was dead—that he had received a—he had been stricken with something that had produced a hemorrhage [R. p. 49]."

The witness added that he felt the boy's pulse, "but he was not breathing. He had no pulse at all. He was dead" [R. p. 50]. At that time the man on the front seat was "breathing with difficulty" and that the injured man still had a pulse at the time [R. p. 50].

Bello's testimony corroborated that of Ramirez in the critical detail that the boy was dead at the time of arrival and that the man on the front seat (Appellant's intestate) was alive at the time [R. p. 62].

Cruevas testified on March 15, 1954, on behalf of Appellee, that he was a taxi driver [R. p. 76]; that on April 18, 1953, he was employed to drive a lady from Tia Juana to Mexicali [R. p. 77]; that he arrived at Rumarosa at about 11 P. M. and arrived at the scene of the accident about 45 minutes later [R. p. 78]. He testified that upon arrival the man (Appellant's intestate)

was dead [R. p. 79]; that the boy (Appellee's intestate) was still alive and that "the police" gave him the boy and told him to take the injured lad to the hospital [R. p. 82]. He added that the boy was placed in the back seat of his car and that he and his passenger took the boy to the Mexicali hospital but that the lad was dead on arrival there [R. p. 84]. He also testified that one "local officer" arrived on the scene while he was there and that "federal officers" also came [R. p. 81]. The local police, he said, preceded him to Mexicali [R. p. 83].

Perez, by deposition introduced on March 15, 1954 and taken on February 27, 1954, testified that he was a Mexicali police officer [R. p. 139] on April 18, 1953; that he received an accident call about 1 A. M. on April 19, 1953, and went to the scene of the accident [R. p. 140]. When he got there the Luna-Ramirez federal highway car was already present [R. p. 142]. The boy (Appellee's intestate) *was not there and he did not see the lad until he got to Mexicali* [R. p. 142]. The man (Appellant's intestate) was still in the Nash automobile [R. p. 142]. He did not know when the boy died [R. p. 149]. He was at the scene of the accident ten minutes, more or less [R. p. 154]. He did not see either Thomas or Cruevas at the scene.

Dr. Arevalo, by deposition introduced on March 15, 1954, and taken on February 27, 1954, testified that he was a physician who performed autopsies on the bodies of Young D. Hahn and Herbert Huxley Hahn. He first fixed the date as on or about April 19, 1953 [R. p. 101]. He first testified that he wrote his report on the 20th or 21st of April, 1953 [R. p. 107]. Later he changed his testimony to say that he performed the autopsy on April 21, 1953, and made the report on April 22, 1953

[R. p. 109]. He gave it as his opinion that Young D. Hahn "passed away at April 19th at 20 hours and that the boy, Herbert Hahn, passed away on April 19th at 23 hours" [R. p. 121]. Parenthetically, those times would be April 19 at 8 P. M. as the time of death for Young D. Hahn and Apjril 19 at 11 P. M. for Herbert Huxley Hahn.

Ernestina Thomas, by deposition filed May 22, 1954, and received on August 15, 1954, testified that she was riding with the witness Cruevas on the night of April 18, 1953. (Paging in reference to her testimony refers to the paging in Padre Ex. G since the deposition is not in the Record.) She fixed the time of arrival at the accident at various times: at 1 A. M. [Padre Ex. G, p. 4, line 24]; at 11:45 P. M. [Padre Ex. G, p. 17, lines 20-22]; 11 P. M. [Padre Ex. G, p. 19, line 25]; and again at 11:45 P. M. [Padre Ex. G, p. 38, line 21]. She first testified that she arrived at Rumurosa at 11:45 P. M. [Padre Ex. G, p. 4, line 24.] She testified positively that there was no person at the scene of the accident on her arrival except "the people involved in the accident, and there was nobody else except the watchman" [Padre Ex-G, p. 8, lines 15-16]. Police cars came to the accident later, she said [Padre Ex. G, p. 8, lines 17-22]. The police car did not come, she testified, until about 45 minutes later [Padre Ex. G, p. 9, lines 19-22]. She testified that the boy was alive when he was handed to the taxi driver Cruevas by police officers, [Padre Ex. G, p. 11, lines 13-18] and that upon her arrival at the Mexicali hospital at about 2 P. M. he had been dead some ten minutes [Padre Ex. G, p. 15, lines 4-7]. The fair inference from her testimony is that the man (Appellant's intestate) was dead when she arrived [Padre Ex. G, p. 6, lines 12-21].

The witness Ritchey, called by Appellant on August 16, 1954, testified that he was a police officer of San Diego on April 18, 1953, and that he interviewed the witness Ernestina Thomas on May 7, 1954 [R. pp. 161-162]. He said she told him that upon her arrival at the accident two police cars were already present [R. p. 163], that she did not take the pulse of the man in the front seat (Appellant's intestate) or touch him, or notice the pupils of his eyes [R. p. 165].

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

Appellant's contentions on this appeal involve two issues. The first of them is that under the peculiar circumstances of this case the District Court abused its discretion in granting continuances and in re-opening the case for taking of additional evidence, a course that resulted in dragging the case out for a period of six months from the time when counsel for both sides announced that they were ready for trial. The trial which began on February 8, 1954, was not concluded until August 16, 1954. The issues were not obscure. At the pre-trial conference, held on January 11, 1954, the cause was set for February 8. At that time Appellee's counsel announced that he would seek to introduce an autopsy report to fix the time, and thus the order, of deaths. Appellant at once put Appellee on notice that he would object to the report in any attempt to use it for that purpose. Points and authorities were presented by both sides to the Court on the issue as to its admissibility. Appellee's counsel, by his own admission, [R. p. 40] knew on February 5, 1954, that the Court had taken an adverse view of the admis-

sibility of the report. Yet on February 8, 1954, he announced ready. Appellant announced ready and produced the witnesses Ramirez and Bello. The Court on its own motion, over the repeated protests of Appellant, continued the cause to March 1, 1954, even after Appellee's counsel admitted that he had been to the scene of the accident within three weeks of the accident and without any showing whatsoever of any diligence in preparation of the case or to secure witnesses.

The cause did not go to further trial on March 1, 1954, because in the interim, Appellee secured another continuance to March 15, 1954, in order to take the depositions of Dr. Arevalo (the very physician who had signed the autopsy report) and Perez. The matter was apparently concluded on March 15 and the Court announced a finding of simultaneous death. But Appellee was not done. On April 5, 1954, counsel for Appellee made a motion to re-open to take additional evidence. Appellant objected again. The motion was granted and the deposition of Ernestina Thomas was taken. Finally the trial dragged to its close on August 16, 1954.

There were, then, three stages of the case.

1. The stage which it had reached on February 8, 1954, when there was no competent evidence before the Court except that of Ramirez and Bello as to the priority of death. At that time the Court, had it rendered a decision, would have been forced to find that Appellant's intestate was the survivor.

2. The stage which it had reached on March 15, 1954, when a conflict had arisen by reason of testimony adduced on the Cruevas testimony and the Arevalo and Perez depositions and at which the Court announced a finding of simultaneous death.

3. The stage which it finally reached on August 16, 1954, after the Thomas deposition in which the Court found that Appellee's intestate was the survivor.

We will show that the Court overreached its discretion and by thus extending time to Appellee in effect forced the result. Appellant was denied an orderly trial; as he met each issue the Appellee was given time to circumvent the result and this without any showing of diligence in preparation that would have excused the dilatory tactics.

The second of Appellant's contentions is that the Findings are contrary to the evidence. We will show that there was no "sufficient evidence," within the meaning of Section 296.3 of the Probate Code of California, produced by Appellee to support the proposition that Young D. Hahn and Herbert Huxley Hahn "died otherwise than simultaneously."

Specification of Errors Relied Upon.

I.

The District Court erred in granting the continuance of February 8, 1954; in granting the continuance of February 25, 1954; and in granting the motion to re-open on April 8, 1954.

II.

The District Court erred in making the Finding that Herbert Huxley Hahn survived Young D. Hahn and such Finding is not supported by the evidence.

ARGUMENT OF THE CASE.

Summary.

The guarantee of a fair trial comprehends an orderly trial in which the parties stand on equal footing. Witnesses in this case had to be secured in the Republic of Mexico thus putting a heavy burden on both sides. Where there is sharp conflict in evidence, otherwise small factors may weight the cause against one party or another. At the time the cause was called for trial, Appellant had his witnesses present. They testified. They were to be contradicted in some important details by Appellee's witnesses: particularly on the vital issue of their time of arrival at the scene of the accident. Had Appellee presented his depositions and his witness at the time of the hearing Appellant's witnesses would have been available for rebuttal, or to explain apparent contradictions. But by the time Appellee had adduced his evidence these witnesses were not, and could not be, present. On the other hand, Appellee had every advantage of building up a case step by step to meet every issue presented by Appellant and to meet the Court's observations as to its deficiencies. Appellee made absolutely no showing of diligence in trying to procure and present witnesses at the time the cause was originally set, on February 8, 1954. He had no excuse for not having been ready. There is no showing and no pretence at showing that any of the witnesses he finally presented were interviewed, or even sought, prior to the trial date. Appellee built up this step-by-step case to meet the exigencies of every moment, through the advantage extended to him by the Court.

The evidence bearing directly on the priority of death is that of Ramirez and Bello on one hand and that of

Cruevas and Thomas on the other. Dr. Arevalo's testimony is worthless, since he fixed the times of the deaths as almost twenty-four hours after their occurrences. Cruevas and Thomas each contradicted the other in the very important detail as to whether the police officers were present on arrival. Perez added nothing except that he was present at the scene. In that state of the testimony there was no sufficient evidence as to the priorities of the deaths.

Argument As to Abuse of Discretion in Granting Continuances and Re-opening of Case.

The granting of continuances and the order re-opening the case to take additional evidence are part of the same pattern. Each was a step in dragging out the case to the advantage of Appellee.

Appellant is fully aware that the granting or denial of a continuance rests within the sound discretion of the District Court. Of course, the discretion to be exercised is a judicial discretion. It is noteworthy here that the continuance of February 8 was not requested by Appellee but was injected by the District Court, on the supposition that his ruling as to the admissibility of the autopsy report might have misled Appellee. But Appellee had made no such claim. The very possession of the report pointed witnesses out to him. He announced ready when the cause was called for trial, and made no request for continuance until after the Court's insistence that it should be granted. The autopsy report was signed by Dr. Gustavo Arevalo but *absolutely no effort had been made by Appellee to take the physician's testimony.* The very witnesses, Cruevas and Perez, were indicated as such in reports available to and in possession of Appellee. Appellee's

counsel had been in Mexicali shortly after the accident to make an investigation. No effort had been made to take the deposition of either Cruevas or Perez or to have them present at the trial on February 8. The short of it is that Appellee had made no efforts, and he asserts no diligence at making any efforts, to have Cruevas or Perez present at the trial on February 8. Had the depositions of Cruevas been taken or had they been interviewed the witness Thomas would have been discovered. As was well said in an analogous case involving a request to reopen.

> "Public policy should not permit 'A party litigant to gamble on reliance on one theory at the trial and after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet other issues . . .'"
>
> *Rue v. Fuetz,* 103 Fed. Supp. 499, 502.

Having failed to support his announcement of readiness on February 8, and having been given a continuance until March 1, the Appellee appeared on February 25 to seek a new continuance to take depositions. That motion was opposed by the Appellant. The Court granted it. In his supporting affidavit Appellee's counsel made no showing of diligence in seeking the depositions. He simply recited that after the continuance he "went to Mexicali and endeavored to make arrangements for the taking of the deposition of Dr. Arevalo and two other witnesses who had been personally present at the scene of the accident." He did not say when he went to Mexico. He recited that he met "many objections of the Mexican officials" to the taking of the depositions. He did not recite the difficulties. He simply wanted more time to produce witnesses whom he now almost miraculously, certainly fortuitously, found

were available but who had been equally available to him when the cause was first called for trial on February 8. The very fact that he found such witnesses between February 8 and February 25 is eloquent of the lack of diligence he had displayed in failing to have them present at the original trial on February 8. The continuance was granted, until March 15.

The production of the witnesses, Perez and Arevalo by depositions, and Cruevas in person availed Appellee little. The Court found simultaneous death. Findings of Fact and Conclusions of Law were prepared by Appellant's counsel and Appellee objected to them.

Finally, Appellee filed Notice of Motion for Order Re-Opening Case for Additional Evidence or for a New Trial. The Motion was heard on April 5 and granted on April 7. The motion was based on an affidavit by Appellee's counsel. He recited that he had first learned of the existence of Ernestina Thomas, the witness who said she arrived at the scene of the accident in an automobile driven by the taxi driver Cruevas, on February 17—a date which was prior to the continued trial date of March 1 and the actual trial date of March 15. He further set forth that Cruevas had given him the woman's name on March 14; that he found her on March 20, and talked to her on March 21, Her affidavit was attached. The diligence thus attempted to be shown is more apparent than real because it is a diligence exerted *after* the date the cause was set for trial, rather than in preparation for trial. It is, moreover, a diligence exerted in the same context as that adverted to in *Rue v. Fuetz,* 103 Fed. Supp. 499 in which a litigant gambles on the outcome of a trial and then, when an adverse result appears indicated by the record, seeks to reopen.

The net result of the series of continuances and orders reopening was to delay the determination of the issue for six months and while there is a discretion in the District Court there is a point at which the exercise of such discretion constitutes an abuse. In an analogous situation it was said:

> "Where trial commenced on March 3, 1939, and witnesses were available for speedy hearing, action of the trial court, without request of counsel, for four adjournments so that the case was not concluded until December 17, 1939, although the trial should have taken ten days was an abuse of discretion. Public policy demands that in the interests of justice a trial once entered upon should be proceeded with from day to day."
>
> *The Plow City,* 122 F. 2d 816 (3 Cir.).

Here was a trial that should have taken a day at most, in which counsel announced ready but which was dragged on for six months.

The motion to reopen or for a new trial is also a matter that rests in the sound discretion of the District Court. As the cogent portion of Rule 59(a) provides:

> "On a motion for new trial in an action tried without a jury, the Court may reopen the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions and direct the entry of a new judgment."

The situation here was that no judgment had been entered but the Court had announced a finding on March 15 of simultaneous death. Under this situation the motion to take additional evidence should have been subjected to the same scrutiny as a motion for new trial and

the same rigorous standards applied to the question of whether or not it should be granted.

> "In a court case where the judge has not rendered a decision but has indicated by an opinion or otherwise how he intends to decide, a motion to take additional testimony *to supply a defect in formal proof need not be treated as a motion for a new trial; but if additional testimony goes beyond that then the motion to take additional testimony closely approaches that of a motion for new trial on the ground of newly discovered evidence.*" (Emphasis added.)
>
> 6 Moore's Federal Practice, 2d Ed. 3723.

The evidence sought to be produced when the motion to reopen was made was not to supply a defect in formal proof but went far beyond that; it was germane to Appellee's whole theory of the case. It was his evidence in chief. Hence the motion did approach a motion for new trial on the grounds of newly discovered evidence.

A motion for a new trial on the grounds of newly discovered evidence must meet five tests:

(1) There must be a showing that the evidence was discovered since trial.

(2) There must be a showing of facts from which reasonable diligence in trying to procure the evidence prior to trial.

(3) The evidence sought to be introduced must not be cumulative.

(4) The evidence must be material.

(5) There must be a showing that a different result will probably be reached.

> *Marshall's U. S. Auto Supply v. Clampett,* 111 F. 2d 140 (10 Cir.).

Here there was no showing whatever that the first three of the conditions had been met. True enough, the evidence, came to light after a partial hearing of the case, but that is not the entire test. The movant can not sit idly by and when threatened with adversity excuse inaction by an after acquired diligence.

> "To warrant a new trial the evidence must not have been known to the movant at the time of trial; and moreover the movant must have been excusably ignorant of the facts, *i. e.*, the evidence must be such that it was not discoverable by diligent search."
>
> Moore's Federal Practice, 2d Ed. 3785.

The very fact that the witness Thomas was found by Appellee between February 8 and March 20 is proof enough that no diligence had been exercised in searching for her prior to that time. Every indicia of her existence and of her address was as easily available to Appellee after January 11, the date of the pre-trial hearing, as it was after Appellee had failed in the production of witnesses on March 15 to persuade the Court to his point of view. In the month between January 11 and February 8, Appellee did nothing to find the witness but in a roughly comparable period of time after February 8 he did locate the witness. The difference between his actions in the two situations is due to the fact that he switched his theory of the case after February 8 and applied the diligence to find witnesses that would have produced the same result had he done so before trial. And, of course, the *evidence was cumulative.* The Thomas deposition was simply used to cumulate the effect of the Cruevas testimony.

If the test of newly discovered evidence as it bears on a motion for new trial had ben applied here, as it should have been, the motion should have been denied. A new trial will not be granted for newly discovered evidence which with reasonable diligence could have been discovered at trial.

Grant Co. Deposit Bank v. Greene, 200 F. 2d 835 (6 Cir.).

Nor does the fact that a different result *did* flow from the taking of the additional evidence argue that the motion should have been granted. By that pragmatic test any different result is made to appear as justification for the granting of a motion no matter how dilatory a litigant may be. Thus in *Marshall's U. S. Auto Supply v. Clampett, supra,* after a trial by jury there was a verdict for defendant. A new trial was granted on the ground of newly discovered evidence. Then there was a verdict for plaintiff. The Court of Appeals for the Tenth Circuit kept its attention centered on the *motion,* rather than on the *result* of the trials, and reversed on the sole ground that the motion for new trial should not have been granted; the result was to reinstate the verdict of the first hearing and to order entry of judgment for the defendant. So, here, what is at stake is whether or not the *motion* to take additional evidence should have been granted and not what flowed *after* that motion had been granted and additional testimony had been taken.

A fair trial is more than the formalities that surround a hearing. Every step, no matter how adverse to one party or another, can be clothed with the appearance of fairness. That is what happened here. On February 8, the Appellant met the burden imposed on him; the Appel-

lee failed utterly to assume his burden. A continuance was granted. There was a continuance until March 1; the Appellee was still not ready to shoulder his burden. A continuance was granted until March 15; the Appellee tried again and still could not meet the burden of proving that Herbert Huxley Hahn survived his father. A motion was made to reopen and granted and finally Appellee achieved his end, *and that through testimony that was available to him at the time the cause was set for trial on February 8.* It would be a rare litigant indeed who could not have his way if he was thus supplied with opportunities to piece-meal his evidence almost indefinitely to meet every successive rebuff. On the other hand, Appellant was disadvantaged by every turn of this wheel of fortune. His witnesses were produced and testified on February 8; thereafter, because of the peculiar facts of the case, they were not available for rebuttal or to meet new testimony, *developed to meet the very testimony they had offered.* The very purpose of the ordinary requirement that a trial must proceed from day to day until concluded is to put the parties on that equal footing which is an integral part of due process. The necessity in this case was greater than in the ordinary litigation because the witnesses could not be summoned by subpoena. They lived in Mexico. They could be secured only at the expense of great time and trouble. The witnesses Ramirez and Bello testified they got to the scene at 11:30 or 11:40; Thomas directly contradicted that by asserting that she arrived first with the taxi driver. The police officers made no mention of Thomas' presence at the scene or of handing the child to her and no such inquiries were directed to them on their initial appearance. These, and other inconsistencies between the testimony offered by the officers and the witnesses Cruevas, Perez, and Thomas,

could not be met or explained by Appellant due to the attenuated character of the trial. There is too, the undoubted fact, that time blurs testimony, even for trial judges, and that testimony adduced six months after witnesses for one side have been heard is susceptible of exerting greater weight than it might have had the matter been considered in orderly fashion. If the cause is set at large for an orderly trial the objections urged here will doubtless not recur.

Argument As to Findings Not Supported By Evidence.

The cogent portion of Rule 52(a) provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Obviously, this portion of the argument must be constructed within the limits of the Rule. The Supreme Court has laid down the rule for guidance of appellate courts in these words:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."
>
> *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, 394.

The rule has been thus stated:

> "Under Rule 52(a) a finding is clearly erroneous if it is against the clear weight of the evidence and it *does not suffice that it is supported by evidence."* (Emphasis added.)
>
> *Fleming v. Palmer,* 123 F. 2d 749 (1 Cir.); Cert. Den., 316 U. S. 662.

When considering the weight of the evidence the consideration to be given the trial court's opportunity to judge of the credibility of the witness varies with the type of evidence adduced at the trial. If the witnesses appeared in person then it is plain that the trial court has an advantage of the reviewing Court. That advantage disappears if the witnesses appeared by deposition, or if the evidence is documentary.

> "However findings of fact based on documentary evidence, on uncontradicted evidence, or testimony taken by depositions and in similar situations where credibility is not seriously involved, or if it is, where the reviewing court is in just as good a position as the trial court to judge credibility, are not binding on appellate courts and will be given slight weight on appeal."
>
> *Equitable Life v. Irelan,* 123 F. 2d 462 (9 Cir.).

The documentary evidence in this case bearing directly on the priority of death is that contained in the autopsy report which, buttressed by the testimony given by Dr. Arevalo through his deposition, fixes the times of the deaths as of the night of April 19, although everybody agrees that the deaths occurred some time during the night of April 18. This document gave priority to the death of Young D. Hahn but no credibility can be attached either to the document or to the witness in view of the utterly ridiculous statement as to the times of death. The trial court must have paid as little heed to it as this Court can attach.

Three of the four witnesses ultimately produced by the Appellee, who claimed some intimate knowledge of the facts, testified through depositions. They were Dr. Are-

valo, Lupercio Perez and Ernestina Thomas. Only one, Cruevas, appeared in person. Therefore, the trial court was in no better position to make a judgment as to credibility than this Court except in the one instance. However *after* the Court had heard Appellant's witnesses and the witness Cruevas it made a finding of simultaneous death, indicating that little weight was given to this testimony as weighed against the testimony of Ramirez and Bello, the police officer witnesses for Appellant.

We have previously pointed out that the Arevalo testimony was hopelessly at odds with what all parties know to be the facts. The Perez deposition appears in the Record at pages 139 to 159. He testified that he did not get to the scene until at least 1 A. M. on April 19 and that when he got there he found the Ramirez-Bello police car there.

> "All, we did was get there and we pick up the lady and drove away." [R. p. 142.]

The Buick car in which the witnesses Cruevas and Thomas were riding was not there, according to the witness. He did not see the boy until he got to Mexicali. He was postive that:

> "The only car present was the Nash, where the passengers, collided with the equipment at the scene of the accident. And Mr. Luna's (Note: Ramirez, the names Ramirez or Luna are used interchangeably by witnesses following the Spanish custom.) car was also there and ours." [R. p. 141.]

The purport of this testimony is to buttress that of Ramirez and Bello that they arrived on the scene before any other officers.

Ernestina Thomas found herself at odds with Perez. We have previously adverted to the confused state of her

testimony as to the time of arrival. Looking at the record, which is all the trial court could do since she appeared by deposition, it is impossible to arrive at any conclusions as to the time when she did come on the scene. She directly disputed Perez by saying that the second police car (that of Perez and his partner) arrived *before* she left the scene of the accident. Cruevas also testified to the same purported fact but, as we have pointed out, Perez testified positively that he did not see the woman or the Buick or the taxi driver until *after* he went to Mexicali. The witness Thomas testified that the boy (Herbert Huxley Hahn) was put into her arms by police officers, and if that was done, it must have been done by Bello or Ramirez since Perez did not arrive, according to him, until she had gone. They gave no such testimony, although the fact would have been important. Further doubt is cast on the Thomas testimony by the fact that the witness Ritchey said that she told him police officers were present when she arrived. She also testified as to her knowledge of the presence of the boy in the car:

> "Q. Now, after you arrived at the scene of the accident how long had you been there before you knew that there was a baby or boy in the back seat of the car? A. About 45 minutes, until the police arrived." [Padre Ex. G, p. 38, lines 22-25.]

However she added immediately that Cruevas had told her there was a boy in the back seat, and a moment later that Cruevas showed her the boy, 15 minutes after their arrival at the scene [Padre Ex. G, p. 39, lines 1-24]. She also testified that although she sat in the front seat of the Buick automobile she put her hand on the boy and felt his heart beat, although the witness Ritchey said she told him the opposite. Although Perez testified positively,

as pointed out, that the Buick was not at the scene of the accident when he arrived, and that he did not see the boy until he arrived in Mexicali, Cruevas said that:

> "Q. And were you given any instructions by the traffic officers as to what to do with the boy? A. They told me to follow them until we arrive at the hospital.
>
> Q. Which officers told you that? A. The traffic officers.
>
> Q. And did the local police car (Note: the Perez car) then leave the scene and head toward Mexicali? A. Yes, they went to the hospital right away.
>
> Q. And did you follow them immediately? A. Yes.
>
> Q. Did you keep up with them? A. Not quite too close because the baby was sick and also the lady was sick?
>
> Q. By the lady are you referring to the lady who was riding with you? A. Yes."

Here is utter confusion, casting the gravest doubt on the whole story told by Thomas and Cruevas. A trained police officer, used to investigating accidents, called to an accident to care for the injured, testified postively that neither Cruevas nor Thomas was present upon his arrival. He had no doubt on that score. He could not forget an incident so important as whether or not he led the car to Mexicali or who was present when he arrived. He was Appellee's witness. Yet other Appellee's witnesses contradict him and in the choice there is every reason to believe him to be correct.

The witnesses, Ramirez and Bello, were also trained police officers, accustomed to taking down the details of an accident and to assessing important facts. Neither of

them testified to any such fact as giving the boy to the woman Thomas or to the taxi driver. In their case, as in Perez, there is every reason to believe that such an important fact would have been impressed in their memories.

In contrast to the testimony of the witnesses for the Appellee the testimony of the police officer witnesses for Appellant were straight forward and without contradiction. It would seem that in light of the requirements of Section 296.3 that there must be lacking that "sufficient evidence that they have died other than simultaneously" and that in the state of the record the only possible finding was that either Young D. Hahn had survived or that the two died simultaneously.

Inextricably interwoven with the argument that the evidence does not sustain the critical finding is the manner in which the trial was conducted at intervals which blurred testimony and gave Appellant little, or no, chance to meet the next onset of Appellee's testimony. Under the circumstances, this Court should closely scrutinize the record, particularly the testimony of the witnesses.

The ends of justice will be best served in this cause by returning it for that orderly trial to which all parties are entitled, or by revising the finding to that of simultaneous death.

Respectfully submitted,

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